given, the action would have been carried on with the ordinary incidents of pleading and trial, and the matter would have been left in doubt until judgment. I cannot help thinking that no order in an action will be found to be final unless a decision upon the application out of which it arises, but given in favour of the other party to the action, would have determined the matter in dispute."

The plaintiffs on the other hand contended that the proper test was laid down in *Bozson* v. *Altrincham Urban District Council* [3] where Lord Alverstone C.J. at page 548 said:—

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

Counsel for the plaintiffs also relied on *Egerton* v. *Shirley* [4] where, although the Court of Appeal declined to say which of the two conflicting tests was the correct one, nevertheless at page 110 said of an Order 14 order which was made in an action on a specially indorsed writ:—

"In our opinion, the rights of the parties in this case were finally disposed of when leave to sign final judgment was given by the master."

We preferred to adopt the test laid down by Lord Alverstone C.J. as being the correct test to apply to the provisions of section 68(2) of the Courts of Judicature Act, 1964 and accordingly dismissed the appeal.

Here, the position is an unusual one in that it is the plaintiffs who are in effect asserting that the defendants are entitled to appeal without leave against the order of Choor Singh J. on the ground that the order is not an interlocutory but a final order. That being the view taken by the plaintiffs, the first defendants having on the affidavits prosecuted the appeal against the Order XIV order within the time required under the Federal Court (Civil Appeals) Transitional Rules, 1963, need not have appealed against the order made by Buttrose J. on the 3rd March 1967 as they had an absolute right, according to the plaintiffs, to appeal against the order giving the plaintiffs liberty to enter final judgment against them.

Appeal dismissed.

Solicitors: *D. G. Ironside; R. C. H. Lim & Co.*

DAVID v. CHETTIAPPAN

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) July 17, 1967]

[Ipoh — Federal Court Civil Appeal No. X. 36 of 1966]

Landlord and Tenant — Rent controlled premises — Recovery of possession — Whether rents collected exceeded maximum permitted — Meaning of "maximum permitted rent" how ascertained — Qui sentit commodum debet sentire et onus — Individual and multiple sub-letting — Control of Rent Ordinance, 1956, ss. 6 and 12(1)(j).

The premises No. 43 Station Road at Ipoh were premises governed by the Control of Rent Ordinance, 1956. The appellant, who was a tenant of these premises, appealed against the judgment for possession given against him in an action brought by his landlord, the respondent, on the ground that he had infringed paragraph (*j*) of sub-section (1) of section 12 of the Ordinance by collecting rents from individual sub-tenants in excess of the permitted rent for the parts respectively sublet to them, although in the aggregate the total rents collected from all sub-tenants were not an overcharge under paragraph (*j*).

The trial judge found the landlord's maximum recoverable rent to be $650 per month while rents collected by the tenant totalled $665 per month. The maximum he could have collected was $715.

Held: (1) in order to arrive at a finding as to what was the 'maximum recoverable rent' or 'maximum permitted rent' there must be evidence to ascertain what was the standard rent plus the increase of 50% according to the First Schedule. Scrutiny of the evidence showed that the trial judge had no data before him to make a finding as to what was the standard rent on or after September 25, 1940. The respondent therefore, failed to prove that the total rents collected by the appellant were in excess of the maximum permitted rent under the Ordinance;

(2) on the proper interpretation of paragraph (*j*) "rents" should mean the rent of one part sublet, where there is only one subletting, and aggregate rents where several parts are sublet to be considered as a whole.

Semble: where the plaintiff in an action has himself been in breach of mandatory provisions of the Ordinance, he is disentitled from relying on a double standard which is one sum of standard rent for him and a different sum for his tenant. "In such a case the court may fairly and properly apply the maxim: *Qui sentit commodum debet sentire et onus.*"

Cases referred to:—

(1) *Keane* v. *Clarke* [1951] 2 K.B. 732.

(2) *Bolger* v. *Daly* [1925] 2 I.R. 42.

(3) *Heydon's Case* (1584), 3 Co. Rep. 8.

(4) *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cases 743, 764.

(5) *The Solio Case* [1898] A.C. 571, 573.

FEDERAL COURT.

N. H. Chan for the appellant.

P. P. Dharmananda for the respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Ipoh ordering the tenant of premises known as No. 43 Station Road, Ipoh, to deliver possession thereof to the landlord. The tenant now appeals to this court against that judgment. Having regard to the date of the incident, the Control of Rent Ordinance of 1956 would appear to apply in this case.

The cause of action before the High Court was based on respondent's right of recovery of possession under paragraph (*j*) of sub-section (1) of section 12 of the Ordinance, on the ground that the appellant had been collecting rents from

his sub-tenants, totalling $650 which exceeded the maximum permitted rent for the premises.

The learned trial judge found that the maximum recoverable rent for this premises was $600 per month. He therefore made the order as he did.

Section 12(1)(*j*) gives the power to the court to order recovery of possession of premises by the landlord if the total rents collected from sub-tenants by the tenant exceed the maximum permitted rent. What is a maximum permitted rent? It would appear that a maximum permitted rent is the maximum recoverable rent as defined in section 6 of the Ordinance and in the present case that would be the standard rent increased by 50% according to the First Schedule of the Ordinance.

There was evidence that the premises were let in 1940, but there is no evidence before the court as to what was the rent at which the premises were let on the 25th day of September 1940. It was urged before the trial court, once it has been proved that the premises were let on or before the 25th September 1940, the respondent, as the plaintiff at the trial, would fail in his claim, because he would not be able to prove what the standard rent was and therefore was not able to prove what the maximum recoverable rent of the premises was at the relevant date of this claim.

The learned judge said on this point as follows:—

"Unless therefore the standard rent plus the authorised increases exceeded $650 per mensem, the defendant cannot justify the rate of the rentals now charged. It would be unreasonable to presume that the plaintiff had let out the premises at a lower rental than what he is entitled to under the law. Further, from the facts of the tenancy as established by the evidence of SP. Ramasamy who was formerly an assistant and later an agent of the plaintiff's firm it would be reasonable to presume that the rent in 1940 was not more than $400 a month. According to his evidence during the periods he was in this country the premises were let out from 1942 to 1946 at a rental of $400 per mensem, in 1949 at $500 per mensem and in 1960 at $650 per mensem. With the increase permitted under the First Schedule of the Rent Control Ordinance, the maximum recoverable rent would be $600 per mensem, if the standard rent was $400 per mensem."

I think it is necessary to refer to some more of the facts to understand the above. SP. Ramasamy in a deposition taken by the Senior Assistant Registrar of the court, and it was this deposition which was produced as evidence at the trial, at first stated that the rent in 1940 was $400 per mensem, but he admitted that he himself did not know this. The trial judge thereupon held that this was hearsay. He thereupon considered that it would be reasonable to presume that the rent was not more than $400 because according to Ramasamy, the rent from 1942 to 1946 was $400 per mensem.

It was urged by appellant's counsel before us that the judge was wrong in coming to the figure of $400 as the rent in 1940 as he did. In the case of *Keane* v. *Clarke*,[1] "there was no evidence whatever of any letting of the premises at any time to Woods on May 27, 1944", and for that reason according to Mr. Chan for the appellant the Court of Appeal held "that the facts given in evidence led to the inference that either letting in 1944 was the first letting or that the rent at which the premises was let was the standard rent, and therefore the tenant had discharged that onus and established a *prima facie* case."

In the Irish case of *Bolger* v. *Daly* [2] Kennedy C.J. held that on the evidence before the court, there was a letting on the 1st November 1918 "which, no earlier letting having been proved, appears to be a first letting and at a rent within the limits of the application of the Act which give us the statutory standard rent".

I personally would express agreement with Mr. Chan that in both these two cases it was proved that there was no earlier letting or that the facts given led to the inference that the letting proved was the first letting. The facts in the two cases referred to and that of the present case are different. In the present case the respondent admitted there was a letting of the premises in 1940 but he was unable to produce evidence to show what the rent was in September 1940.

In a case of this nature, it is in my view essential for the respondent to prove what the actual rent was in September 1940, and since he had failed to do this he has therefore failed to prove that the total rents collected by the appellant were in excess of the maximum permitted rent.

I would therefore allow the appeal and set aside the judgment of the court below. No order as to costs here and below.

Ong Hock Thye F.J.: The question raised in this appeal is one of considerable nicety and difficulty in construing the provisions of section 12(1)(*j*) of the Control of Rent Ordinance, 1956.

In October 1963 the appellant became assignee of the tenancy of premises No. 43 Station Road, Ipoh, upon the purchase of the business of Pax United from the former tenants. The appellant had been a sub-tenant of the latter since January 1, 1959. The premises were a three-storeyed shophouse within the definition of "premises" in the Control of Rent Ordinance, 1956. It was owned by the respondent landlord since long before the Second World War. The rent demanded by the respondent and paid by the appellant was $650 per month, for which the respondent, at the start, issued two separate receipts — $600 for rent and $50 in respect of

repairs, the latter being undoubtedly fictitious.

On November 19, 1963 the respondent's solicitors gave notice to the appellant requiring written particulars of all subletting, pursuant to section 14(1) of the Ordinance. The information required had already been supplied by the former tenants, Pax United, on March 27, 1961, but the appellant, in compliance with the notice, duly sent a detailed statement showing the rents paid by each sub-tenant, the total sum paid by all six of them being $665. Further correspondence followed evincing curiosity on the part of the respondent as to the floor space occupied by each sub-tenant. In the result the appellant, taking legal advice, applied on December 19, 1963 to the Rent Assessment Board under section 16 to apportion the rent of the whole premises as between the tenant and all the sub-tenants and to "determine the maximum recoverable rent of all or any one or more part or parts of the whole premises . . . sublet to any and every sub-tenant thereof." The six sub-tenants were cited as respondents, but the landlord himself was not made a party for the purpose of any determination of rent as between tenant and landlord.

On March 27, 1964 the respondent gave notice terminating the appellant's tenancy on April 30, 1964. On May 1, 1964 the writ in the action was issued.

In his statement of claim the respondent pleaded that the maximum recoverable rent of the premises was $650 a month and alleged (a) that in respect of six sublet portions the appellant was receiving rents in excess of the maximum recoverable rent for the portions respectively sublet; (b) that such rents including the apportioned value of the part not sublet exceeded by more than 10 per cent the rent of the whole premises: consequently he claimed possession under section 12(1)(*j*). Particulars of the subletting were given as follows:—

(a) *Overseas Agency*, 1032 sq ft. of the ground floor, for $110 per month.

(b) *Civil Store*, 600 sq. ft. of the ground floor, for $70 per month.

(c) *Packi & Co.*, 1132 sq. ft. of the ground floor, for $75 per month.

(d) *David & Co.*, 283½ sq. ft. of the ground floor, for $70 per month.

(e) *Ipoh Tutorial Institute*, the whole of the 1st floor, 3825 sq. ft., for $250 per month.

(f) *Wong Sow Nam*, the whole of the second floor, 3825 sq. ft., for $100 per month.

Except that the last-named paid $80 instead of $100, the rents paid by the sub-tenants was not disputed.

On June 4, 1964 the Rent Assessment Board made an order "that the rent in respect of the whole premises will be as follows:—

(a) *Overseas Agency*	$ 95.00
(b) *Civil Store*	65.00
(c) *Packi & Co.*	95.00
(d) *David & Co.*	70.00
(e) *Ipoh Tutorial Institute*	214.50
(f) *Wong Sow Nam*	143.00
(g) *Pax United* (Appellant)	10.00

It will be observed that the total rents charged only amounted to $665 and, allowing $10 more for the value of the portion retained by Pax United, the appellant was still not receiving rents in excess of 10% over the rent of the whole premises, which amount would be $715.

On the other hand, it is also to be observed, upon a comparison of the rents charged with the apportionment made by the Board, that there was a total overcharge of $55 in respect of sublets to *Overseas Agency, Civil Store* and *Ipoh Tutorial Institute*, but an aggregate undercharge of $63 in respect of *Packi & Co.* and *Wong Sow Nam*.

The learned trial judge, however, made his own calculation, according to the formula in section 15(b), and reached the conclusion that the "maximum permitted rents" were as follows:—

(a) *Overseas Agency*	$ 65;	excess $45
(b) *Civil Store*	38;	excess 32
(c) *Packi & Co.*	71;	excess 4
(d) *David & Co.*	32;	excess 38
(e) *Ipoh Tutorial Institute*	241;	excess 9
(f) *Wong Sow Nam*	241;	excess Nil.

In the result he held that all sub-tenants except Wong Sow Nam had been overcharged. He was, of course, aware that an apportionment had already been made on June 4, 1964 by the Rent Assessment Board, but he was of opinion, according to some decided case which unfortunately was not cited, that "an order of the Rent Assessment Board has no retrospective effect" and that such order was irrelevant. With the greatest respect I think this view was erroneous and took no account of the clear provisions of para. (a) of section 15, that the maximum recoverable rent shall be "such amount as may have been determined by the Board under subsection (4) of section 8 or section 16." Indeed the provisions of section 17 fortify my opinion that it was intended that the court should have regard for such apportionment as may be made by the Board.

I turn now to the provisions of paragraph (*j*) of section 12(1) of the Ordinance which reads:—

"Where the tenant having sub-let the premises or part thereof receives in respect of such subletting rents (exclusive of any payment for the services provided by any local authority) for any sub-let part of the premises in excess of the maximum permitted rent for that part

or rents which including the apportioned rental or value of any part of the premises retained by the tenant or not sub-let by him exceed in the aggregate by more than ten per centum the rent of the whole premises."

As to the second limb of this paragraph, the learned judge, if I may so say with respect, quite rightly held that the aggregate rents collected from the sub-tenants, including the value of the part retained, did not exceed by more than 10 per cent the rent of the whole premises. On this ground, therefore, the respondent's claim failed. The judge, however, decided in the respondent's favour on the first limb of paragraph (*j*).

The provisions of this paragraph must accordingly be subjected to the closest examination and analysis. It has been argued with great force and persuasiveness by Mr. N. H. Chan, counsel for the appellant as follows: "Maximum permitted rent" being the term used in paragraph (*j*), the onus lay on the respondent to establish definitely the amount of such rent. There is no definition of "maximum permitted rent" but only definitions of "maximum recoverable rent" and "standard rent". However, treating "maximum *permitted* rent" as synonymous with "maximum *recoverable* rent", the maximum permitted rent of any sublet part can only be ascertainable — in accordance with the formula prescribed in paragraph (b) of section 15 — provided that the basis of calculation, namely, the "maximum recoverable rent of the *whole* premises", is first ascertained. In order to do this, one has to fall back on section 6, the relevant portion of which is paragraph (b) (iii), providing that the "maximum recoverable rent shall be to the extent set out in the third column of the First Schedule to this Ordinance, in respect of the types of premises and the *standard rents* set out adjacent thereto in the first and second columns of the said schedule." One then has to fall back a step further on "standard rent", because the "maximum recoverable rent" cannot be ascertained without first ascertaining what the "standard rent" was. In this case the only way to discover the "maximum permitted rent" was to ascertain the "maximum recoverable rent", which is "standard rent" plus 50 per cent. Accordingly, it was submitted by Mr. Chan that the issue in this case necessarily turned on the amount of "standard rent" and since the learned trial judge was unable, for want of proper data, to make any finding of what was the "standard rent," the respondent landlord failed to discharge the onus which lay on him as claimant to repossession under paragraph (*j*).

"Standard rent" is defined in section 2 as meaning: "The rent at which the premises were let on the 25th day of September 1940; or in the case of premises which were then unlet, unoccupied or unbuilt, the rent at which the premises were first let after the 25th day of September 1940". As to what the "standard rent" was in the instant case the learned judge said as follows:—

"It is quite true that the evidence adduced by the plaintiff to the effect that the rent at which the premises were let in 1940 was $400 is pure hearsay; and since the premises was not 'unlet, unoccupied or unbuilt' in 1940 the rent at which the premises were let first after the 25th of September 1940 is irrelevant for the purpose of determining the standard rent.

However, if counsel's contention is correct, which I doubt, then the provisions of section 12(1)(*j*) cannot be invoked if for some reason or other a landlord is unable to produce evidence as to what the rent of the premises was on the 25th of September 1940."

With respect, I do not think the dictum is a correct statement of the law. *Per incuriam* it must be, because subsection (3) of section 8 expressly provides that in such a case "the Board shall have power to determine the standard rent as being of such amount . . . as the Board thinks proper." That being so, my view is that Mr. Chan's argument has the force of logic which cannot be brushed aside except by a finding of fact as to "standard rent" or "maximum recoverable rent."

Taking the view most favourable to the respondent a finding as to the amount of standard rent can still hardly be spelt out from the following passage of the judgment by reason of the judge's conclusion regarding the maximum recoverable rent:—

"It would be unreasonable to presume that the plaintiff had let out the premises at a lower rental than what he is entitled to under the law. Further, from the facts of the tenancy as established by the evidence of SP. Ramasamy, who was formerly an assistant and later an agent of the plaintiff's firm, it would be reasonable to presume that the rent in 1940 was not more than $400 a month. According to his evidence during the periods he was in this country the premises were let out from 1942 to 1946 at a rental of $400 per mensem in 1949 at $500 per mensem and in 1960 at $650 per mensem. With the increase permitted under the first Schedule of Rent Control Ordinance,, *the maximum recoverable rent would be $600 per mensem, if the standard rent was $400 per mensem.*

On the evidence before me I hold that the lawful rental of the premises is $650 per mensem and should be regarded as the maximum recoverable rent."

Having perused the First Schedule to the Control of Rent Ordinance of 1948 and 1956, in the light of the evidence of SP. Ramasamy, I am inclined to think that the standard rent probably was $400 per month, so that the maximum recoverable rent should have been $600. Had the learned trial judge so held (which he did not) he would have been merely accepting the averment in paragraph 2 of the statement of claim, namely:—

"The defendant until the termination of his tenancy in manner set out in paragraph 6 hereof was the monthly tenant of the said premises at the monthly rental of $600 and a further sum of $50 in respect of repair charges by virtue of an assignment from the previous tenant of the said premises."

The next paragraph, however, to my surprise, reads: "The maximum recoverable rent of the said premises is $650 per month". This could only be true if the standard rent was $433.30. But the evidence in fact was all the other way, pointing to $400. Hence, I think the obvious inference is that the respondent had unlawfully increased the rent by $50 per mensem even while Pax United were the tenants, contrary to section 3 of the Ordinance (see agreed bundle of correspondence exhibited in the record). For this reason I respectfully disagree with the judge's conclusion that "$650 p.m. should be regarded as the maximum recoverable rent". What evidence was there for so holding? The fact that this was the contractual rent was immaterial, because the parties could not "contract out" of the provisions of the Ordinance.

Assuming that $400 was the standard rent this, of course, would place the respondent in a quandary. Where the plaintiff in an action has himself been in breach of mandatory provisions of the Ordinance, should he be entitled to rely on a double standard which is one sum of standard rent for him and a different sum for his tenant? Surely, in such a case the court may fairly and properly apply the maxim: *Qui sentit commodum debet sentire et onus.* If the respondent himself was free to flout the quantum of standard rent, does it lie in his mouth to say that it should still govern the rents received by the appellant from his sub-tenants? So deciding the issue raised in this appeal would, of course, be the easy way out. The court, however, would be shirking its plain duty when faced squarely with the problem raised in the instant case. I shall, therefore express my opinion without any attempt at evading the issue.

Paragraph (*j*), in my view, is a bad piece of drafting. The word "rents" in the first limb thereof is used in juxtaposition to "any sub-let part of the premises in excess of the maximum permissible rent for that part." As "rents" is plural and there cannot be more than a single rent for one subletting, I think the proper inference to be drawn from the extraordinary concatenation of the singular with the plural is that the word must connote several sub-lets taken together in cases where there is more than one part of the premises sublet. Clearly this must be so because in his pleading the respondent had to resort to the word "respectively" which does not appear in paragraph (*j*). Consequently "rents" should mean the rent of one part sublet where there is only one subletting, and aggregate rents where several parts are sublet but considered as a whole. Any other construction would be unreasonable and unjust. The most firmly established rules for construction of an obscure statute are those laid down in *Heydon's Case,*[3] quoted in *River Wear Commissioners* v. *Adamson,*[4] and in *The Solio Case,*[5] where the Earl of Halsbury L.C. said:—

> "Among the things which has passed into canons of construction recorded in *Heydon's Case*, we are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed and the reason of the remedy."

It is notorious that Rent Control legislation had led to intolerable abuses causing landlords to be victimised by unscrupulous tenants. Paragraph (*j*) has been and clearly is intended to suppress the mischief and provide a remedy against unconscionable conduct. In this case, not only had the second limb of paragraph (*j*) not been flouted, but also the first, when account is taken of the undercharges, which exceeded the amount of the aggregate overcharge. The appellant's conduct was indeed such that no reasonable landlord can possibly have cause for complaint of profiteering.

I would therefore allow the appeal and set aside the judgment and order of the court below. There again will be no order as to costs.

Barakbah L.P. concurred with Ong Hock Thye F.J.

Appeal allowed.

Solicitors: *Cheang, Lee & Ong; Dharmananda & Co.*

SUNDRALINGAM v. RAMANATHAN CHETTIAR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) July 17, 1967]

[Ipoh — Federal Court Civil Appeal No. X. 54 of 1966]

Moneylenders — Promissory note not attested in accordance with statutory requirement — Effect of — Moneylenders Ordinance, 1951, s. 27 — Interpretation of.

Precedent — Judicial courtesy — Agreement to differ — Failure to bring relevant case to notice of judge — Judgment made per incuriam.

A moneylender sued the borrower for money lent on a promissory note which was not attested in accordance with the requirements of section 27 of the Moneylenders Ordinance, 1951. The borrower did not understand the written language of the note; but on account of previous transactions it was admitted that he was aware of the terms and contents of the note. Counsel cited *Narayanan* v. *Alagappa* [1] as authority for the note not being invalidated for non-attestation if the borrower understands the terms, though not the written language, of the note. In the circumstances the trial magistrate felt bound by the decision of the superior court and gave judgment for the moneylender. The judgment was affirmed by the High Court on appeal ([1966] 2 M.L.J. 293). The appellant borrower appealed to the Federal Court on the question of the proper interpretation of section 27 of the Ordinance.

Held: as the promissory note in this case was not attested in accordance with the statutory requirements of the Ordinance it was void.

Narayanan v. *Alagappa* [1] overruled; *Kasumu* v. *Baba Egbe* [3] applied.